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PERSPECTIVES ON IMMIGRATION IN 2016 THROUGH MY CRYSTAL BALL

Posted on January 23, 2016 by Cyrus Mehta

2016 portends to be an action packed year on immigration. While we continue to watch Donald Trump touting his absurd proposal to temporarily ban Muslims, we can feel assured that it will likely not go anywhere. This is not the first time that America has witnessed such extreme anti-immigrant sentiments. It happened before in the mid-1800s when the Know Nothing party directed its ire against Irish Catholics, and later on in that century when the Know Nothings faded, other anti-immigrant demagogues railed against the inferiority of Jews and Southern European immigrants.

These earlier demagogues preceding Trump included Samuel Morse, well known as the inventor of the telegraph and Morse code, who like Trump does with Muslim immigrants warned against Catholic immigrants whom he thought would be more loyal to the Pope:

> *How is it possible that foreign turbulence imported by shiploads, that riot and ignorance in hundreds of thousands of human priest-controlled machines should suddenly be thrown into our society and not produce turbulence and excess? Can one throw mud into pure water and not disturb its clearness?*

A leading sociologist of his time in the late 19th century Edward Ross stated that Jews were "the polar opposite of our pioneer breed. Undersized and weak muscled, they shun bodily activity and are exceedingly sensitive to pain." Regarding Italians, Ross noted that they "possess a distressing frequency of low foreheads, open mouths, weak chins, poor features, skewed faces, small or knobby crania and backless heads."

The good news is that all of these anti-immigrant movements soon became irrelevant, and one does not need a crystal ball to predict that Trump, regardless of his current rise in the polls, will also be relegated to the trash bin of history.

This week, the Supreme Court agreed to hear the challenge to the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and extended Deferred Action for Childhood Arrivals (DACA) programs. The key issue is whether the President overstepped his powers provided to him in the INA by deferring the removal of a class of people who are in the United States in an undocumented capacity or not. My crystal ball reveals that the majority of justices in the Supreme Court will agree with the President. It is well acknowledged that the Executive Branch does have authority to prioritize on who should be removed from the country, given the limited funding that Congress gives it every year. Even if the Supreme Court required briefing on another question - whether the President is required to "take Care that the laws be faithfully executed" under Article II, Sec. 3 of the Constitution - it is hard to imaging a Supreme Court ruling that would require the President to enforce the law against each and every of the 11 million or more who are not authorized to remain in the United States. At current levels of funding, it is manifestly impossible for ICE to deport most undocumented persons in the United States. Even at the historically high levels of removal under President Obama who has been termed by many as the Deporter in Chief, some 400,000 per year were removed, which amounts to only 3-4% of the total undocumented population. The government also exercises prosecutorial discretion in criminal matters, and no one bats an eyelid, and has also developed guidelines regarding prioritizing enforcement with respect to states that have legalized marijuana. Accordingly, it is difficult to see how the President can be forced to take a different position with respect to immigration enforcement.

The truth is that deferred action is neither recent nor revolutionary. Widows of US citizens have been granted this benefit. Battered immigrants have sought and obtained refuge there. Never has the size of a vulnerable population been a valid reason to say no. During the presidencies of Ronald Reagan and George H. Bush, significant number of family members of recipients of the 1986 legalization program were allowed to remain in the United States through executive actions. Even if the law suit alleges that the President does not have authority, now is a good time to remind critics about Justice Jackson's

famous concurrent opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952), which held that the President may act within a "twilight zone" in which he may have concurrent authority with Congress. Unlike *Youngstown Sheet and Tube Co. v. Sawyer*, where the Supreme Court held that President Truman could not seize a steel mill to resolve a labor dispute without Congressional authorization, the executive branch under the recent immigration actions is well acting within Congressional authorization. In his famous concurring opinion, Justice Jackson reminded us that, however meritorious, separation of powers itself was not without limit: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Id.* at 635. Although President Truman did not have authorization to seize the mill to prosecute the Korean War, Justice Jackson laid a three-pronged test to determine whether the President violated the Separation of Powers clause. First, where the President has express or implied authorization by Congress, his authority would be at its maximum. Second, where the President acts in the absence of congressional authority or a denial of authority, the President may still act constitutionally within a "twilight zone" in which he may have concurrent authority with Congress, or in which its distribution is uncertain. Under the second prong, Congressional inertia may enable, if not invite, measures of independent presidential authority. Finally, under the third prong, where the President acts in a way that is incompatible with an express or implied will of Congress, the President's power is at its lowest and is vulnerable to being unconstitutional.

Through the Immigration Accountability Executive Actions, the President is likely acting under either prong one or two of Justice Jackson's tripartite test. INA 103(a)(1) charges the DHS Secretary with the administration and enforcement of the INA. This implies that the DHS can decide when to and when not to remove an alien.." INA 212(d)(5), which Congress also enacted, authorizes the Executive to grant interim benefits for "urgent humanitarian reasons" or "significant public benefits." Incidentally, parole can also be used to allow promising entrepreneurs to come to the United States and establish startups, although this and many other executive actions to help businesses have not been attacked in the law suit. Moreover, INA 274A(h)(3) provides authority to the Executive to grant employment authorization. Even if such

authority is implied and not express, Congress has not overtly prohibited its exertion but displayed a passive acquiescence that reinforces its constitutional legitimacy. It should be noted though that the Fifth Circuit Court of Appeals in upholding the preliminary injunction noted that this provision did not provide authority for the President to issue work authorization under DAPA. In terms of employment authorization issuance, Congress has rarely spoken on this except via INA § 274A(h)(3), so that many instances of employment authorization issuance are purely an act of executive discretion justified by that one statutory provision. If the Supreme Court limits the President's authority under INA 274A(h)(3), it could jeopardize many other immigration programs under which work authorization is issued through this provision. Furthermore, INA 103(3) confers powers on the Secretary of Homeland Security to "establish such regulations, prescribe such forms or bonds, reports, entries and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act."

Another more recent case that cuts in favor of President Obama is *Arizona v. United States*, 132 S.Ct. 2492, 2499 (2012), which articulated:

> *" principal feature of the removal system is the broad discretion exercised by immigration officials…Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all…*
>
> *Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state maybe mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to*

> *these and other realities."*

Another key issue is whether states should be even permitted to sue the federal government on immigration enforcement policy. If President Obama loses, it would then be an open invitation for any cantankerous state politician to bring a law suit against the federal government over an immigration policy that he or she dislikes. The ability of a state to harass the federal government could be endless. For instance, a state could sue the federal government for granting deferred action to other groups of non-citizens, such as victims of domestic violence or crime victims or widows and widowers of US citizens, like the federal government has done in the past. These sorts of challenges from states would undermine the long established doctrine that immigration policy is within the purview of the federal government and Congress, and that the federal government has that discretion with respect to enforcement, as upheld in *Arizona v. United States*. Another concern for upholding preemption of federal immigration law from interference by states is the concern about the relationship between immigration and foreign affairs. *See Toll v. Moreno*, 458 U.S. 1 (1982); *Hines v. Davidowitz*, 312 U.S. 52 (1941). If a state were allowed to sue each time the federal government issued a policy and blocked it, this would upset the long acknowledged preemption doctrine relating to immigration. If there is a disagreement in how the Executive Branch implements immigration policy, it is for Congress to intervene by changing the law rather than for states like Texas to file a law suit.

Ultimately, Justice Kennedy will most likely cast the deciding vote in upholding DAPA, but my crystal ball hints that other justices from the conservative wing such as Justice Roberts may concur, due to their abhorrence on broadening the standing doctrine under Massachusetts v. EPA, which was essentially a liberal decision that gave Massachusetts standing to force the EPA to issue a rule to regulate greenhouse gases. On a personal note, it is highly abhorrent to equate the harm caused by pollutants with the supposed harm caused by immigrants, who will more likely benefit than harm the state through their tax dollars and many other contributions.

On the business immigration front, things do not look so bright unfortunately. The H-1B cap filing season will again take place this April 2016, and the cap will surely be hit within the first five days of April, and Congress will not lift a finger to increase the cap. Indeed, it will be fortunate if it does not lift that finger since

the current mood in Congress is to restrict the H-1B, along with the L-1 visa programs, even further. It is better to have the H-1B program in place as is, as further restrictions could also affect those who are already in H-1B status, and it would be harder for them to seek H-1B extensions through their employers under a new law.

Regarding forward movement in the employment-based dates, although the filing dates for the EB-2 and EB-3 for India and China have remained the same when they were abruptly pulled back on September 25, 2015, the December 2015 Visa Bulletin predicted the following:

> *China: Forward movement of this date during FY-2015 has resulted in a dramatic increase in demand. Little, if any movement is likely during the coming months.*
>
> *India: Up to eight months.*

EB-2 China actually did creep forward in February from 01FEB12 to 01MAR12, when the above-quoted predictions said there would be "Little, if any movement", and EB-2 India has already advanced more than a year from 01JUN07 in December to 01AUG08 in February despite being predicted to move only "Up to eight months", so the predictions may have been a bit overly pessimistic. My crystal ball predicts some forward movement over the remainder of the year, but alas, with regards to the movement in the filing dates, my crystal ball has become cloudy as it fails to understand the logic of the government in not moving the filing dates correspondingly forward. Perhaps, the Mehta v. DOL lawsuit will force the government to provide some clarity, or the government will some day realize that it can move the filing dates substantially forward based on its historic broad interpretation of visa availability under INA 245(a)(3). But for now my crystal ball fails me, which is most unfortunate, as skilled immigrants who are legally in the United States deserve more clarity than anyone else.